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No. 839

In the Supreme Court of the United States

OCTOBER TERM, 1958

EARL E. WRIGHT, JR., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute and regulation involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Armour & Co. v. *Wantock*, 323 U.S. 126	6–7, 10
Bell v. *Porter*, 159 F. 2d 117, certiorari denied, 330 U.S. 813	6
Biggs v. *Joshua Hendy Corp.*, 183 F. 2d 515	10
Bowers v. *Remington Rand*, 159 F. 2d 114, certiorari denied, 330 U.S. 843	6
Central Missouri Tel. Co. v. *Conwell*, 170 F. 2d 641	10
Conn v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757	6
F. W. Stock & Sons, Inc. v. *Thompson*, 194 F. 2d 493	10
General Electric Co. v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951	6, 11
Glenn L. Martin Nebraska Co. v. *Culkin*, 197 F. 2d 981, certiorari denied, 344 U.S. 866	6
Mitchell v. *Strickland Transportation Co.*, 228 F. 2d 124	11
Rokey v. *Day & Zimmermann*, 157 F. 2d 734, certiorari denied, 330 U.S. 842	6, 10

805238—59

Cases—Continued
Sawyer v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868 ..... Page 6
Skidmore v. *Swift & Co.*, 323 U.S. 134 ..... 6, 7–8, 10
Statutes:
Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901 *et seq.*:
Sec. 201 2
Sec. 301 2
Miscellaneous:
Navy Civilian Personnel Instruction 85, as amended:
Sec. 4–4 ..... 2, 11
Sec. 4–5x 3, 11
S. Rep. No. 687, 85th Cong., 1st Sess., p. 2 9

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OPINIONS BELOW

The opinions of the Court of Claims in the present case (Pet. App. 1a) and in the companion case of *Merlin M. Armstrong, et al.* v. *United States*, 145–56, January 14, 1959 (Pet. App. 2a–9a) are not yet reported.

JURISDICTION

The final judgment of the Court of Claims was entered on January 14, 1959 (R. 75). The petition for a writ of certiorari was filed on April 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether civilian firefighters employed by the Department of the Navy and the General Services

Administration are entitled, under the Federal Employees Pay Act of 1945, to compensation for periods of on-call time specifically set aside for eating and sleeping.

STATUTE AND REGULATION INVOLVED

The Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901 *et seq.*, provides in pertinent part:

> SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: * * *. [5 U.S.C. 911.]
>
> * * * * *
>
> SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate 10 per centum in excess of his rate of basic compensation for duty between other hours: * * *. [5 U.S.C. 921.]

Navy Civilian Personnel Instruction 85, as amended, provides in pertinent part:

> SEC. 4-4. STANDBY DUTY.—When an employee is placed in a standby status he is placed in a duty status which, under decisions of the Supreme Court (323 U.S. 126), is subject to compensation. As here used, "standby status"

and "standby duty" are synonymous. Both mean "work" for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work. * * *

* * * * *

SEC. 4–5x. * * * Under the rule, two-thirds of each hour on duty is credited as pay time. The first 60 hours on duty, less one-third or 20 hours allowed for sleeping and eating, is regarded as the basic 40-hour workweek. The straight time payable during the basic workweek is two-thirds of the hourly rate of pay for each of the first 60 hours of duty. Night work pay is computed on the basis of two-thirds of the hourly night work rate for the hours of the workday during which the night differential is payable. For the "overtime" portion of the scheduled workweek, overtime is credited at two-thirds the hourly overtime rate. Holiday premium pay is credited at two-thirds the hourly premium rate for not more than 12 hours of the holiday. An employee to whom the two-thirds rule is applied is charged two-thirds of an hour's pay, rather than an hour's pay, for each hour in a nonpay status on a workday within his basic workweek.* * *

* * * * *

STATEMENT

Petitioners, civilian firefighters employed at various times by the Department of the Navy and the General Services Administration, seek overtime and night-differential compensation, under the Federal Employees Pay Act of 1945, for periods of on-call time

specifically set aside for eating and sleeping (R. 1–3).[1] The pertinent facts, which were stipulated (R. 31–35, 102–03), may be briefly summarized as follows:

Prior to May 1, 1955, petitioners Wright and Snowman were employed as firefighters by the Navy Department at certain of its installations. They performed three 24-hour tours of duty per week. On May 1, 1955, responsibility for these installations was transferred to the General Services Administration, and Wright and Snowman thereafter worked two 24-hour and one 12-hour tours of duty per week (R. 33). Petitioner Van Sickle was employed at these installations as a guard on a 40-hour per week basis prior to May 1, 1955, and as a firefighter-guard on a 60-hour per week basis after that time (R. 102–03).

All of the petitioners were compensated by both agencies for firefighting duties pursuant to the so-called "two-thirds rule." (R. 33, see p. 3, *supra*.) Under this method of compensation, one-third of a tour of duty, although time when a firefighter is subject to call and must remain on government premises, is set aside for eating and sleeping and is non-compensable. The remaining two-thirds of the tour is divided equally between active work time and an inactive stand-by period. Both of these periods are considered to be compensable hours of employment, and are subject to the application of overtime and night-differential rates.

[1] The Government's counterclaims for certain amounts of hourly and night-differential pay, received for time spent in eating and sleeping, were dismissed.

In the present case, petitioners received pay for 48 hours (40 hours at the regular rate and 8 hours at the overtime rate) when on the 72-hour week, and received pay for 40 hours when on the 60-hour week. Night-differential pay was credited for two-thirds of the nighttime duty hours. They were permitted to sleep from 7 o'clock P.M. until 7 o'clock A.M. during each 24-hour tour of duty and were required to be in bed by 11 o'clock P.M., at which time a bed check was made (R. 32). Petitioners were allowed three meal periods of at least 30 minutes' duration in each 24-hour shift (R. 56).

The occasional work which petitioners were called upon to perform during periods set aside for eating and sleeping constituted *de minimis* interruptions of such eating and sleeping time. Petitioners seek no recovery for the minimal amount of work performed during those periods (R. 102–03).

The Court of Claims denied recovery on the authority of the companion *Armstrong* case, decided the same day, in which it held that firefighters working under substantially identical conditions were not "entitled to compensation for time spent in sleeping and eating, merely because such time was subject to possible interruptions" (Pet. App. 5a).

ARGUMENT

In two companion cases this Court considered the question of whether time spent on an employer's premises by firefighters who are subject to call, but who are not engaged in the performance of actual work, constitutes working time for the purposes of

the Fair Labor Standards Act. *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Armour & Co.* v. *Wantock*, 323 U.S. 126. The Court held that the question cannot be resolved on the basis of any legal formula, but is a question of fact to be resolved by appropriate findings of the trial court in the light of all of the circumstances of each case. Since the *Armour* and *Skidmore* decisions, the Court has consistently refused to review lower court decisions dealing with the compensability of such time under varying factual situations. *E.g., General Electric Co.* v. *Porter*, 208 F 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Bowers* v. *Remington Rand*, 159 F. 2d 114 (C.A. 7), certiorari denied, 330 U.S. 843; *Rokey* v. *Day & Zimmermann*, 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Sawyer* v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868; *Conn* v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757. In the two cases last cited, this Court declined to review decisions of the Court of Claims with respect to the rights, under applicable pay statutes, of civilian firefighters employed by the Government. The present case is simply another in this series. It does not present any new general question, nor is it in conflict with any other decision (each of which depends upon its own particular facts), and, accordingly, further review here is not called for.

1. In *Armour & Co.* v. *Wantock*, *supra*, the district court had held that firefighters employed by a private

company were not entitled to compensation for stand-by time normally set aside for eating and sleeping but were entitled to be paid for the remaining hours on call during which no actual work was performed. Both the court of appeals and this Court affirmed that portion of the judgment which was adverse to the employer; the employees, who had contended that all stand-by time was compensable, took no appeal. Thus, the precise issue in the present case—whether eating and sleeping time is compensable—was not specifically resolved. The Court pointed out, however, that (323 U.S. at 133):

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

In *Skidmore* v. *Swift & Co., supra,* decided on the same day, this Court reversed a lower court decision refusing any recovery whatever for on-call time during which no actual work was performed. The Court held that no principle of law precluded a determination that waiting time was working time and that "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." (323 U.S. at 136–37, 140.) Again, the question of compensation for relatively long, uninterrupted periods of waiting time set aside for eating and sleeping was not directly in issue.

But the Court discussed with approval the way in which the Administrator of the Wage and Hour Division had resolved the entire problem administratively (323 U.S. at 138–39). The Administrator had concluded that a flexible solution was necessary and that in some situations periods of inactivity are not properly counted as working time *even though the employee is subject to call,* such as portions of a 24-hour tour of duty when the employee "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits." (323 U.S. at 138.) With respect to firefighters, the Court noted with approval the conclusion of the Administrator, expressed in his brief *amicus curiae* in that case, that the appropriate standard called for "the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances * * *." (323 U.S. at 139.)[2]

We submit that the Court of Claims correctly applied these principles in holding that petitioners were

[2] This is also the understanding which the Senate Committee on Post Office and Civil Service has of the Federal Employees Pay Act. In recommending a proposed amendment to that

fully compensated by being paid both for the time actually worked and for the inactive period of standby duty, and are not entitled to additional compensation for time spent in eating and sleeping, even though they were subject to call during those periods. As stipulated by the parties, petitioners were permitted to sleep from 7 o'clock P.M. until 7 o'clock A.M. during each 24-hour shift and were allowed three meal periods of at last 30 minutes' duration each (R. 33, 56). Any interruptions for work during these periods were *de minimis* and, accordingly, petitioners sought no recovery for such interruptions but only for time spent eating and sleeping during regular, lengthy periods set aside for such purposes. A recovery of this kind would be unprecedented and contrary to the consistent practice under both the Fair Labor Standards Act and applicable federal pay statutes.

2. Petitioners contend (Pet. 6–8) that the decision below is in conflict with certain appellate decisions under the Fair Labor Standards Act. As noted

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Act, the Committee said (S. Rep. No. 687, 85th Cong., 1st Sess. p. 2):

"The equity of the bill lies in the fact that under its terms each fire fighter or other 'long-tour standby' employee would be paid for unscheduled and irregular overtime beyond his established tour on exactly the same basis as other Federal employees. In that respect the committee desires to make clear that overtime would not be paid for time allowed for eating and sleeping during overtime assignments. This is consistent with the provisions of the Federal Employees Pay Act under which standby employees paid under the regular hourly premium pay provisions are not paid for uninterrupted periods allowed for sleeping and eating and the Fair Labor Standards Act which does not require that standby employees in industry be paid for such periods."

above, under *Armour* and *Skidmore*, the result reached in a given case must depend upon its peculiar facts and circumstances. The alleged conflicts merely reflect the different factual situations involved in those cases.

In *Central Missouri Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8), the court held that an employer could not deduct 3 hours as sleeping time from an 11-hour shift of night telephone operators. The decision was based on the fact that the operators could rest only as duties permitted, constantly had to attend to the switchboard and other work matters during the entire tour, and on many nights were disturbed at frequent intervals. Thus, the operators were not only in readiness but rendered considerable service for which they had received no compensation. The court distinguished on these grounds its own decision in *Rokey* v. *Day & Zimmermann, supra*, that on-call time of firefighters involving long periods of uninterrupted sleep was not compensable.

Similarly, in *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (C.A. 9), the Court of Appeals affirmed a trial court's finding that the employees were entitled to compensation for lunch periods since they were required to work during those periods. And in *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493, the Sixth Circuit held that mechanics' and engineers' "lunch periods" were compensable since the time was spent predominantly for the employer's benefit watching and caring for machinery—"a man who has to oil machinery with a sandwich in his hand

is not having a "free lunch period." (194 F. 2d at 496.)

In *General Electric Co.* v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951, the Ninth Circuit, noting that whether or not sleeping time of firefighters is compensable depends upon the circumstances, took into account that the firefighters had to protect not only the employer's plant area but two populous communities as well, thus greatly increasing the probability of an alarm at night. And finally in *Mitchell* v. *Strickland Transportation Co.*, 228 F. 2d 124, the Fifth Circuit stated with respect to a night watchman that "as we hold the relationship to be employment, no deduction is to be made for times his wife, or members of his family spelled him on the job, whether he was resting, sleeping, * * * or otherwise engaged on the premises." (228 F. 2d at 128–29, fn. 14.)

Since each of these decisions thus turns on its own facts, they do not present any conflict requiring resolution by this Court.[3]

[3] Petitioners' reliance on Navy regulations (Pet. 16–18) is entirely misplaced. Section 4–4 of NCPI 85 (*supra*, pp. 2–3) is nothing more than an adoption of this Court's decisions in the *Armour* and *Skidmore* cases (cited in the regulation) that on-call time may be compensable even though no actual work is performed. The stand-by time referred to is one part of the 24-hour shift which is also divided into working time, and sleeping and eating time. It is only the latter that is in issue here, not the inactive stand-by period. That this is the correct meaning of Section 4–4 is made absolutely clear by Section 4–5x of the same regulation (*supra*, p. 3), which sets out the two-thirds method of compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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